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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

J. L. DAY,
Petitioner

v.

STATE OF TEXAS,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIRST SUPREME JUDICIAL DISTRICT OF TEXAS

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I

QUESTION PRESENTED

Is the Bellaire city ordinance, prohibiting the parking of Petitioner's house car on his own driveway, such an unreasonable exercise of police power (having no relation to the public order, health, safety, welfare, or morals) as to be an unconstitutional deprivation of his property rights without due process of law?

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J. L. Day, Petitioner, prays that a Writ of Certiorari issue to review the judgment of the Court of Appeals for the First Supreme Judicial District of Texas, entered in this cause on March 4, 1982. The opinion of the Court of Appeals is printed in Appendix A, hereto, p. A-1, and is unreported.

JURISDICTION

The judgment of the said Court of Appeals, delivered on March 4, 1982, was sought to be set aside by Peti-

tioner's Motion for Rehearing, but the said Court overruled the Motion on April 29, 1982. Petitioner thereafter filed his Petition for Discretionary Review before the Court of Criminal Appeals on June 10, 1982, and said Court refused said Petition in Cause No. 465-82 on July 21, 1982.

Petitioner painfully acknowledges that he is untimely under the new Rules of Court, as he discovered when he called the Clerk's Office to inquire about procedures to request an extension of time on or about October 18, 1982, but offers in mitigation the following grounds:

(a) Petitioner's counsel has just completed a successful campaign as the Democratic nominee for the office of Associate Justice of the First Court of Appeals of Texas, which has jurisdiction over a fourteen county area. The campaign was hotly contested and accordingly demanded a huge investment of time, not to mention emotional commitment. Said counsel is a one-man firm, without any law clerks or secretarial help, and he was frequently exhausted physically in attempting to keep a semblance of his practice going during his campaign for public office. Immediately upon the public election of November 2, 1982, Petitioner's counsel was able to devote the time and energy necessary to complete the tasks required of him, none of which took priority over the preparation of this Petition for Writ of Certiorari.

(b) Petitioner's counsel has been practicing law for thirty years, and is not in the habit of being untimely in meeting his filing obligations. Specifically, Petitioner can accurately and truly say that he has NEVER been late before in the filing of briefs, and in view of the novelty and importance of this case, earnestly requests the Court's

indulgence in considering the factual background of this untimely Petition.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1247(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

(a) Section 23-143 (Vehicle Parking Regulations) of Chapter 24 (Planning and Zoning) of the City Code of Bellaire, Texas, reads as follows:

> In the R-1, R-2, R-3, R-4, R-5, R-6, D-1, D-2, MF-1, and, M-2 Districts, no truck exceeding three-fourth (¾) ton capacity, no bus in excess of fifteen (15) feet in length or seven (7) feet in height, no recreational vehicle, trailer, boat or mobile home shall be parked or stored on any abutting street or within the required front yard space of any property in such Districts, and shall not anywhere within any of said Districts be used as a dwelling nor for business/commercial or storage purposes . . .

(b) The Fourteenth Amendment to the United States Constitution reads in pertinent part as follows:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Petitioner is a resident home owner in Bellaire, Texas, where he has parked his house car in his own driveway in violation of an ordinance enacted by the City of Bel-

laire. This ordinance prohibits parking certain vehicles (recreational vehicles, trailers, boats, and mobile homes) REGARDLESS OF SIZE within the distance between the outermost surface of his home and the edge of the curb. Petitioner has received many citations for apparently violating this ordinance and was convicted in the County Court of Harris County for such violation. Said County Court assessed punishment at a fine of $101.00. Appeal was duly taken to the First Court of Appeals which denied his appeal, on March 4, 1982, holding that ". . . a party attacking an ordinance must show that it is unreasonable and an abuse of discretion; any doubts will be resolved against him. He must also overcome the presumption that the ordinance is valid and constitutional . . ." On April 29, 1982, the said Court of Appeals overruled Petitioner's motion for rehearing.

ARGUMENT

This Court has held in innumerable cases, and with unbroken consistency, that the demands of due process of law in the fair administration of criminal justice are *fundamental.* "Due Process" is a living, expanding principle enjoying a preferred position in our constitutional value system. "Due Process," Justice Frankfurter wrote, "is not confined in its scope to the particular forms in which rights have heretofore been found to have been curtailed for want of procedural fairness. Due Process is perhaps the most majestic concept in our whole constitutional system. While it contains the garnered wisdom of the past in issuing fundamental justice, it is also a living principle not confined to past instances." *Joint Anti-Fascist Refugee Committee v. McGrath,* 341 U.S. 123, 173-4.

"Due Process" has on innumerable occasions been in tension with the idea of "Police Power" belonging to the States. While the police power of a State is not capable of precise definition, it is frequently spoken of as the power of a State to prescribe, within the limits of the federal and state constitutions, reasonable regulations necessary to preserve the public order, health, safety, welfare, and morals. 16 Am. Jur. 2d *Constitutional Law* § 262, p. 516. It is not an unlimited power. "The fixed rule and basic standard by which the validity of all exercise of the police power is tested is that the police power of the state extends only to such measures as are reasonable . . ." 16 Am. Jur. 2d *Constitutional Law* § 277, p. 537. Petitioner contends that Section 24-143(b) of the Code of Ordinances of the City of Bellaire, Texas (R. 68), providing that, in certain designated residential districts, ". . . no truck exceeding three-fourths (3/4) ton capacity, no bus in excess of fifteen (15) feet in length or seven (7) feet in height, no recreational vehicle, trailer, boat or mobile home shall be parked or stored on any abutting street or within the required front yard space of any property in such (residential) Districts . . ." has no reasonable relation to the public order, health, safety, welfare, or morals, and is therefore a violation of the Fourteenth Amendment to the Constitution of the United States by denying Petitioner of his liberty and property without due process of law.

Petitioner has not found any Texas decisions, declaring or interpreting Texas law, concerning the problem of a homeowner's rights in conflict with the zoning power of a municipality, but will cite for the Court's consideration several relevant decisions from other jurisdictions which have adjudicated the problem.

Commonwealth v. Amos, 44 Pa. D & C 125, 30 Del. Co. 552, 33 Mun. L. R. 171, 55 York. Leg. Rec. 201 (1941), involved a township ordinance prohibiting "any person or persons from parking or locating any trailer which is or can be used for living quarters on any lot, property, or street" within the township limits. The defendant had been residing in a trailer on private property for a number of months. The Court stated that,

> ". . . the real reason raised by the appeal is the constitutionality of the ordinance, defendant claiming that it is so unreasonable and arbitrary as to amount to an unlawful deprivation of liberty and property, without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States."

In invalidating the ordinance as "an arbitrary exercise of the police power," the Court held,

> "This ordinance does not attempt to regulate trailers and trailer camps but arbitrarily and absolutely prohibits the parking or locating of a trailer upon any lot, property, or street within the entire limits of the township. An ordinance which attempts to prohibit parking of a trailer on any street of the township, notwithstanding the fact that a license is obtained from the State which permits the normal operation of trailers upon such public highways, is an arbitrary and unreasonable exercise of power. An ordinance which attempts to prohibit the parking of a trailer upon a lot, irrespective of the time involved in such parking, is also unreasonable and void."

In *Borough of Mountville v. Miller*, 7 Pa. D & C 2d 577, 55 Lanc. L. R. 135 (1956), the Court held

that the Defendant's trailer, located in a commercial area on property owned by her, behind the restaurant she operated,

> ". . . in no way interferes with the preservation of the public health, safety, morals, or general welfare of the community. An ordinance which attempts to prohibit the placing or maintaining of a trailer on one's own land notwithstanding that the health, morals, and safety of the community are not, as in the instant case, affected thereby is an arbitrary and unreasonable exercise of the general powers of the Borough."

Quoting from *Medinger Appeal*, 377 Pa. 217, 222, 104 A.2d 118 (1954), the Pennsylvania Court said,

> ". . . (T)he power to thus regulate (to preserve the health, safety, or morals of the people) does not extend to an arbitrary, unnecessary, or unreasonable intermeddling with the private ownership of property, even though such acts be labelled for the preservation of health, safety, and general welfare. The exercise MUST have a substantial relation to the public good . . ."

Boxer v. Town of Harrison, 175 Misc. 249, 22 N.Y.S. 2d 501 (1940), involved an ordinance which prohibited the parking, storage, or other location of a house trailer on any property within the town without a license, which the Town Clerk could refuse to issue. The action was for an order restraining prosecution of plaintiff, who had a trailer parked at the rear of his property. Plaintiff did not occupy the trailer, but simply parked it on his own property. In holding the challenged portion of the ordinance invalid, the Court stated:

"By reason of this provision, the owner of a house trailer, despite the fact that he owns the property on which it is situated, would be compelled, by the arbitrary terms of the ordinance, to either dispose of the trailer by sale, maintain it in a trailer camp, or remove it from the jurisdiction of the town. As the ordinance reads, the plaintiff could neither have the use of his real property for the storage of his trailer, nor the right to full enjoyment of his personal property. The individual has surrendered much of his liberties in these modern times as a result of the problems presented by modern inventions, congested communities, and a broader vision of social welfare, but even so, there is a limit beyond which he should not be asked to go. There must be some intimate and direct connection between restrictions placed upon the use of his property and the health, comfort, safety, and welfare of society. The ordinance in question, when it prohibits a person from storing an unused trailer, neither a menace to health, safety, or even the aesthetic sense of the community, does not meet that test."

In *Appeal of Kling*, County Court of Allegheny County, Pennsylvania, No. A 1615 (1962), the Court held that a ". . . prohibition against parking the unoccupied travel trailer on appellant's residence or premises, when not using it on trips, is as invalid as would be prohibition against parking the family car or boat there." In the parking of a travel trailer on private property, the Court saw ". . . no relationship between the general welfare, and no possible shadow upon the safety and health of the community."

Arizona v. Titgen, Superior Court of Maricopa County, Arizona, Case No. LCS 8788 (1974), on appeal from an adverse ruling of the City Court, held unconstitutional a

Phoenix ordinance which, *inter alia*, prohibited recreational vehicle parking in any front yard, or side yard, if the unit exceeded five feet in height. The Superior Court found that both the United States and Arizona Constitutions are

> ". . . directed toward the full freedom of the use of real property by the owner or occupant thereof, and he is subject to governmental control thereof only where such control is in the best interest of the public and bears a direct relationship to the public health, safety, morals, general welfare, or orderly growth and development of a community; and, even in such instances, such governmental control is to be strictly construed by the Courts in favor of freedom of the use of property . . . (The parking of recreational vehicles on private property which was not for the residing therein was) not subject to governmental control by criminal sanctions."

(2) In its appellate brief referred to the Court of Appeals, the State argued that the primary objective of the ordinance is traffic safety:

> ". . . like fences and hedges, large recreational vehicles tend to obstruct the vision of passing motorists. Bellaire is an almost totally residential community with a high concentration of children, and section 24-143 is intended to reduce the obvious danger that passing motorists might strike a child who runs, rides, or skates from a yard into the street. . . . The sections of the ordinance dealing with obstructions in front yards are also intended to facilitate law enforcement patrolling, by increasing the field of vision of passing police officers and reducing the number of places of concealment for burglars and other intruders. . . ."

The argument is specious; to consider the precise terms of the ordinance will best disclose its fallacy. A very cursory examination of the ordinance shows that ". . . no recreational vehicle, trailer, boat or mobile home shall be parked or stored . . ." *without any limitation as to size* in the required front yard space. It is the *type* of vehicle that is being prohibited, not a particular size. An automobile is surely no more transparent than a boat or trailer, yet it may be parked *anywhere* without legal inhibition, regardless of how dangerously it may obstruct a passing motorist's vision.

If a house car or boat or recreational vehicle is held aesthetically offensive today, because some people object to them, can the parking of cars over five years of age be similarly outlawed in a wealthy residential neighborhood tomorrow? Or bicycles? Or motorcycles? In each instance, some people will find them aesthetically offensive. But no government—federal, state, or local—can enforce the idiosyncrasies of some, and arbitrarily discriminate against an innocuous class of vehicles, owned by a substantial portion of the populace. Legislative classifications must be reasonable and based upon proper distinctions; the adoption of an ordinance which discriminates against some and favors others is a violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. *Douglas v. California,* 83 S.Ct. 1509 (1968); *Loving v. Virginia,* 87 S.Ct. 1817 (1967); *Levy v. Louisiana,* 88 S.Ct. 1509 (1968); *Traux v. Corrigan,* 42 S.Ct. 124 (1921). Any distinctions between classes must be rational, and bear some relevance to the purposes for which the classification is made. *Rinaldi v. Yeager,* 86 S.Ct. 1497 (1966); *Baxstrom v. Herold,* 86 S.Ct. 760 (1966).

Restrictions on the use of property which are deemed to "go too far" have been recognized as a *taking* of property in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *Pennsylvania Coal Co. v. Mahon*, 43 S.Ct. 158 (1922). And "property" is more than the thing owned: it includes the right to its use and enjoyment. *Terrace v. Thompson*, 263 U.S. 197, 68 L.Ed. 255 (1923); *Buchanan v. Warley*, 245 U.S. 60, 62 L.Ed. 149 (1916).

In the recent case of *City of Euclid v. Fitzhum*, 48 Ohio 297, 357 N.E.2d 402 (1976), cert. den. 429 U.S. 1094, 51 L.Ed.2d 540 (1977), the Ohio appellate court, in reversing a municipal court conviction, held that zoning restrictions for purely aesthetic reasons are unconstitutional, and that any zoning ordinance must be a constitutionally valid exercise of the police power to regulate for the public health, safety, morals, and welfare.

> "The vice of the present ordinance is that the record will support neither an application of the ordinance which bears a substantial, and therefore reasonable, relationship to public health, safety, morals, or welfare, nor the imposition of a taxonomic scheme based on any state of facts that may reasonably justify it . . . Incontrovertible evidence also supports the Equal Protection violation in requiring vehicles in the trailer classification to be enclosed. The evidence is found in the omission of boats from the proscription unless parked on trailers—despite the obvious fact that non-trailer boat parking decreases mobility that a boat so stationed is a greater safety hazard than one capable of movement on wheels . . ."

CONCLUSION

Petitioner submits that, just as an exercise of police power must reasonably relate to a proper governmental purpose, any comprehensive zoning plan or program must reasonably be related to a legitimate community plan. And recreational vehicles, including Petitioner's house car, are no more inconsistent with any such community plan than any other vehicle which, under the particular plan, is allowed parking privileges.

This Bellaire ordinance, by banning all recreational vehicles—regardless of size—from being parked in private owner's *private* driveways, or abutting streets, violates several fundamental constitutional rights. By the unreasonable exercise of governmental power in the guise of general measures for health or welfare or as zoning ordinances, efforts have been made to deprive owners of recreational vehicles of a harmless and proper use of their property.

The Fifth and Fourteenth Amendments to the United States Constitution, and Article 1, § 19 of the Texas Constitution, combine to prohibit any government—federal, state, or local—from depriving any person of his property without due process of law, or from arbitrarily discriminating against his property rights. And as the Supreme Court of the United States has observed, "property" is more than the thing owned—it includes the right to its use and enjoyment. An owner is *deprived* of an essential attribute of property if a law unreasonably restricts or interrupts his usual and intended use of it. This arbitrary enforcement of governmental powers through criminal sanctions—against owners of a particular *type*

of vehicle, regardless of size, age, operating condition, etc.—cannot therefore be constitutionally permissible.

So long as this Court is aware that "house cars" are vehicles, and as such must be parked in the same manner as automobiles; so long as this Court is aware of the aesthetically and economically inoffensive nature of recreational vehicles; so long as this Court bears in mind that any ordinance must bear a rational or necessary connection to a legitimate governmental objective, this Petitioner is confident that his constitutional property rights will be vindicated.

WHEREFORE, Petitioner prays that this Petition for Certiorari be granted, that the conviction and the Judgment of the Court of Appeals sustaining same be reversed, that the Bellaire ordinance in question be declared unconstitutional, and that this Court order the prosecution against Petitioner be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Ben G. Levy, hereby certify that on this, the _____ day of November, 1982, three true and correct copies of the foregoing "Petition for Certiorari" have been mailed to the attorney of record for Respondent, to-wit: Larry P. Urquhart, Assistant District Attorney, Harris County District Attorney's Building, 201 Fannin, Houston, Texas 77002, and to the State Prosecuting Attorney, P. O. Box 12405, Austin, Texas 78711.

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